

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
  
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Application of  
Community Assisted Living, Inc., for a  
Variance from Minn. R. 4625.0900

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

A hearing was held on April 10, 2012, at the Office of Administrative Hearings by Administrative Law Judge Beverly Jones Heydinger, pursuant to a Notice and Order for Hearing and Prehearing Conference, dated August 9, 2011.

The hearing record closed on May 21, 2012, upon receipt of the final post-hearing submission.

Appearances: Gina Jensen, Assistant Attorney General, appeared on behalf of the Department of Health (Department); Samuel D. Orbovich and Katherine A. Burkhart, Fredrikson & Byron, P.A., appeared on behalf of Community Assisted Living, Inc. (CAL).

**STATEMENT OF THE ISSUES**

Did the Department properly deny a variance of Minn. Rule 4625.0900 with respect to four properties owned by CAL?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. The Department is responsible for licensing lodging establishments and for adopting and enforcing rules establishing standards for licensed establishments.<sup>1</sup>

2. Any person, firm, or corporation engaged in the business of conducting a "lodging establishment" must obtain a license from the Department.<sup>2</sup>

---

<sup>1</sup> Minn. Stat. § 157.16.

<sup>2</sup> Minn. Stat. §157.16, subd. 1.

3. CAL provides home care and assisted living services at several locations in Dakota and Scott Counties. Donna Novak, R.N., and Barb Ceballos, R.N., are the co-owners, officers and operators of CAL. Four of CAL's senior residential assisted living homes are the subject of this appeal. Two are in Farmington, Minnesota, at 912 Fourth Street and 911 Honeysuckle Lane. Two are in Shakopee, Minnesota, at 1205 Sixth Avenue West and 915 Fuller Street.

4. The home at 912 Fourth Street was previously licensed to provide Adult Foster Care for up to five clients.<sup>3</sup> It was registered with the Department as a Housing with Services Establishment, which provides sleeping accommodations to adults and offers health-related or supportive services, as defined in Minn. Stat. § 144D.01, subd. 4 (a)(1).<sup>4</sup> At this location, CAL obtained a Home Care Provider or Class F License to provide home care services.<sup>5</sup>

5. CAL also operated licensed Adult Foster Care with similar services at 1205 Sixth Avenue West and 915 Fuller Street.<sup>6</sup>

6. The Adult Foster Care license permitted up to five residents to live in each home.<sup>7</sup>

7. While licensed as Adult Foster Care, CAL had adults in lower level bedrooms at the Fourth Street and Fuller Street locations, and began renovation at Sixth Avenue to convert the lower level room to a bedroom. The Adult Foster Care statutes and rules do not prohibit residents from living in the lower level rooms, so long as the home passes fire marshal inspection and otherwise meets all other regulatory requirements.

8. Although there was no direct evidence, CAL asserted that Dakota County and Scott County wanted CAL to expand to six rooms so that more single rooms would be available for assisted living services in small, home-like settings.<sup>8</sup> Each of the homes has a registered nurse on duty 40 hours a week and a licensed practical nurse on duty 20 hours a week. There is awake staff on duty at all times. The residents need services, and some have moved to one of the CAL homes because they are no longer safe in a larger assisted living facility. The CAL homes are smaller and provide closer supervision.<sup>9</sup>

9. CAL gave up its Adult Foster Care license at Fourth Street, Fuller Street and Sixth Avenue, effective May 31, 2009, and began remodeling the lower level of the home at Honeysuckle Lane.<sup>10</sup>

---

<sup>3</sup> See Minn. Stat. § 245A.11, subd. 2a(b).

<sup>4</sup> Testimony (Test.) of Novak; Ex. B.

<sup>5</sup> Test. of Novak; See Minn. Stat. § 144A.43, subd. 4.

<sup>6</sup> Exhibits T and Y.

<sup>7</sup> See Minn. Stat. § 245A.11, subd. 2a(b).

<sup>8</sup> Test. of Novak.

<sup>9</sup> Test. of Novak; Test. of Ceballos; see Minn. Stat. § 157.15, subd. 8.

<sup>10</sup> Test. of Novak; Test. of Ceballos; Exs. K and L.

10. County representatives visited the homes to take measurements to assure that there would be sufficient square footage to accommodate more residents. Each of the homes passed inspection by the fire marshal.<sup>11</sup>

11. Sometime after CAL dropped the Adult Foster Care license and began serving six persons in each home, it learned from a hospice worker that it needed a lodging establishment license from the Department to house five or more individuals.

12. In December 2010, CAL contacted the Department to inquire about a lodging establishment license.<sup>12</sup> CAL submitted an application, and later that month, Pamela Steinbach, Supervisor of Regulatory Operations in the Environmental Division of the Department, surveyed the four homes.<sup>13</sup>

13. Ms. Steinbach notified Ms. Novak that the Department would not be able to license below-grade sleeping rooms, based on the language of the licensing rule, and that CAL could apply for a variance from the Department's rule for the lower level rooms.<sup>14</sup>

14. On April 8, 2011, CAL submitted an application for a variance from the applicable rule, Minn. R. 4625.0900, for each of the four homes.<sup>15</sup>

15. In support of its application for a variance, CAL stated that it had obtained the required building permits and building inspections and that each of the sites had been inspected and approved by the fire marshal. It stated that the egress windows in the lower level were up to code for exit if needed for fires. CAL also stated that "this remodel was done prior to our deciding to apply for board and lodging license. If we are unable to use [lower level] bedrooms it would hurt our company financially as we would be unable to operate with only [the bedrooms] on the main level."<sup>16</sup>

16. In addition, CAL stated that it had the following policies in place:

Egress windows must pass inspection by fire marshal;

An RN assessing a client's cognitive and physical ability to have a lower level room;

Egress windows must have permanent step stool and grab bars in place for safety issues;

Fire extinguishers maintained yearly;

---

<sup>11</sup> Test. of Novak.

<sup>12</sup> Test. of Novak.

<sup>13</sup> Test. of Steinbach.

<sup>14</sup> Test. of Steinbach; Test. of Novak; Exs. 2-5.

<sup>15</sup> Ex. 8.

<sup>16</sup> Ex. 8. Applications were submitted for a variance for each of the four homes. The number of bedrooms on the main level at each home varies from 3 to 5.

Smoke and carbon monoxide detectors checked with all fire drills.

17. The Department denied the variances for each of the four homes on two grounds:

(1) [g]ranting the variances would pose a potential risk to the safety of vulnerable adults intended to be housed in the below grade rooms; and

(2) [c]ompliance with the rule would not impose an undue burden on [CA:], since the properties are already being used for a business venture.<sup>17</sup>

18. CAL filed a timely appeal of the Department's decision to deny the variance requests,<sup>18</sup> and the Department initiated this contested case.<sup>19</sup>

19. Minnesota Rule 4625.0900 governs space requirements in a lodging establishment.

Every room occupied for sleeping purposes by one person shall contain at least 70 square feet of usable floor space, and every room occupied for sleeping purposes by more than one person shall contain not less than 60 square feet of usable floor space for each occupant thereof.... *No sleeping quarters shall be provided in any basement having more than half its clear floor to ceiling height below the average grade of the adjoining ground.*<sup>20</sup>

20. The sleeping rooms in the lower level of each of the four homes for which CAL is seeking a variance have more than half of their clear floor to ceiling height below the average grade of the adjoining ground.<sup>21</sup>

21. The commissioner of health has the authority to grant a variance from the rule if:

The variance will have no potential adverse effect on public health, safety, or the environment;

The alternative measures to be taken, if any, are equivalent to or superior to those prescribed in the rule;

Strict compliance with the rule will impose an undue burden on the applicant; and

The variance does not vary a statutory standard.<sup>22</sup>

---

<sup>17</sup> Ex. 9.

<sup>18</sup> Ex. 10.

<sup>19</sup> Ex. 1.

<sup>20</sup> Minn. R. 4625.0900, emphasis added.

<sup>21</sup> Ex. 8.

<sup>22</sup> Minn. R. 4717.7010, subp. 1.

22. In granting a variance, the commissioner may attach conditions that the commissioner determines are necessary to protect public health, safety, or the environment.<sup>23</sup> The commissioner shall deny a variance if the criteria in Minn. R. 4717.7010 are not met, subject to the right to appeal by the party denied the variance.<sup>24</sup>

23. CAL challenges the Department's determination that the variance would pose a potential risk to the safety of vulnerable adults intended to be housed in the below grade rooms. Each of the lower level bedrooms has an egress window. In an emergency, when the stairs to the upper level are not accessible, the resident in the lower level bedroom must exit through the egress window. To do so, the resident must climb a step up to the window, turn the crank to open the window, pull himself or herself up on to the windowsill, and crouch to get out the window. Then, the resident must climb several steps to reach the yard above.<sup>25</sup>

24. The video offered into evidence shows that there is a big step up to the window. Once outside, there are narrow steps up to ground level. The video was taken in warm weather. There was no evidence of how snow is kept away from the egress window or the conditions of the steps when there is snow or ice.<sup>26</sup>

25. Each CAL client is assessed by a Registered nurse for cognitive and physical abilities prior to moving in, and after they move in, they are assessed day-to-day by the staff. Clients who reside in a below-grade bedroom undergo fire drills once a month until a nurse determines that each client knows how to get through the egress window. Thereafter, the fire drills are conducted quarterly. If a client's condition has changed in a way that affects the client's ability to egress, the client is moved immediately to an upstairs bedroom or to an upper level bedroom in another CAL home.<sup>27</sup>

26. CAL points to Minnesota Rule 4625.2000, which governs fire protection in a lodging establishment.

All lodging establishments shall provide suitable fire escapes which shall be kept in good repair and accessible at all times. Hallways shall be marked and exit lights provided; fire extinguishers shall be provided and shall be recharged annually and kept accessible for use. No sleeping quarters shall be maintained in rooms which do not have unobstructed egress to the outside or to a central hall leading to a fire escape. All fire protection measures shall be in accordance with requirements of the state fire marshal.

---

<sup>23</sup> Minn. R. 4717.7010, subp. 2.

<sup>24</sup> Minn. R. 4717.7050.

<sup>25</sup> See Exs. A, R, W and DD; See also Ex. MM (video of staff exiting through the egress window).

<sup>26</sup> Ex. MM.

<sup>27</sup> Test. of Ceballos; Test. of Novak.

27. The Department does not dispute that CAL complied with the rule governing fire protection.<sup>28</sup>

28. CAL also challenges the Department's determination that denial of the variance will not be a financial hardship to Cal. CAL claims that it is not financially viable to provide sleeping accommodations only on the first floor of each of the homes. If it is unable to use the rooms on the lower level of the homes, CAL estimates that it will lose \$372,000 a year, approximately 25 percent of its yearly income. This figure is based on an average service cost of \$5100 to \$5200 for each below-grade bedroom per month.<sup>29</sup> Also, the two Farmington homes have only three bedrooms on the main floor level and two on the lower level. It would not be financially viable to operate the Farmington homes with three bedrooms; if they closed, CAL would have a potential loss of an additional \$436,800 in revenue per year.<sup>30</sup>

29. There is a moratorium in place for new foster care licenses, unless the commissioner determines that there is a need for the adult foster care homes in the area where the licensee seeks to operate.<sup>31</sup> Returning to five residents and reapplying for an Adult Foster Care license may not be permitted.

30. Citations to the transcripts or hearing exhibits in these Findings of Fact are not inclusive all applicable evidentiary support in the record.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Department and the Administrative Law Judge have jurisdiction to consider this matter pursuant to Minn. Stat. § 14.50 and Chapter 157.

2. The Department gave proper and timely notice of the hearing and complied with all procedural requirements of statute and rule.

3. CAL bears the burden of proving by a preponderance of the evidence that it should be granted a variance for the four CAL homes.<sup>32</sup>

4. A license is required for every person, firm or corporation that conducts a lodging establishment.<sup>33</sup> A "lodging establishment" is a "building, structure, enclosure, or any part thereof used as, maintained as, advertised as, or held out to be a place

---

<sup>28</sup> Test. of Steinbach.

<sup>29</sup> Test. of Novak; Ex. HH

<sup>30</sup> Test of Novak; Ex. HH.

<sup>31</sup> Minn. Stat. § 245A.03, subd. 7.

<sup>32</sup> Minn. R. 1400.7300, subp. 5.

<sup>33</sup> Minn. Stat. § 157.16.

where sleeping accommodations are furnished to the public as regular roomers, for periods of one week or more, and having five or more beds to let to the public.”<sup>34</sup>

5. “No sleeping quarters shall be provided [in a lodging establishment] in any basement having more than half its clear floor ceiling height below the average grade of the adjoining ground.”<sup>35</sup> Each of the CAL facilities has one or more bedrooms that do not provide the required clearance.

6. The Department may grant a variance to its rules if certain criteria set forth in Minn. R. 4717.7010 are met. CAL has failed to show that the Department has improperly denied its request for a variance to allow sleeping quarters that do not meet the above-grade requirement. Granting the variance will have a potential adverse effect on public health and safety. Strict compliance with the rule will not impose an undue burden on CAL because CAL homes may be licensed for Adult Foster Care.

7. Any Findings of Fact more properly designated as Conclusions are hereby adopted as such.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum incorporated herein, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

The Administrative Law Judge recommends that: the Department's decision to deny CAL's request for a variance to Minn. R. 4625.0900 be AFFIRMED.

Dated: June 20, 2012

s/Beverly Jones Heydinger  
\_\_\_\_\_  
BEVERLY JONES HEYDINGER  
Administrative Law Judge

Reported: Digitally Recorded

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and

---

<sup>34</sup> Minn. Stat. § 157.15, subd.8.

<sup>35</sup> Minn. R. 4625.0900.

the Commissioner must consider the exceptions in making a final decision. Parties should contact Dr. Edward Ehlinger, Commissioner, Department of Health, 625 Robert St. N, PO Box 64975, St. Paul, MN 55164-0975, (651) 201-5810, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.

Under Minn. Stat. § 14.62, subd. 1, the agency/board is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## **MEMORANDUM**

At the heart of this dispute is the appropriate analysis of two rules: one governing space requirements and one governing fire protection. The Department places the emphasis on Minn. R. 4625.0900, which states that “No sleeping quarters shall be provided in any basement having more than half its clear floor to ceiling height below the average grade of the adjoin ground.” The other provisions of this rule include square footage requirements and bed placement for each bedroom. Since the bedrooms at issue do not have more than half their height above grade, the Department asserts that a variance is required, and that health and safety must be considered. In particular, it asserts that the egress window in each lower level bedroom is not sufficiently safe to warrant a variance.

CAL asserts that the Department is improperly introducing fire protection requirements into the variance decision. A separate rule governs fire protection, and it does not prohibit egress windows. It states that “no sleeping quarters shall be maintained in rooms which do not have unobstructed egress to the outside or to a central hall leading to a fire escape.” It also states: “All fire protection measures shall be in accordance with requirements of the state fire marshal.” Since the fire marshal has reviewed and approved each of the homes, including the bedrooms with egress windows, CAL argues that the variance should be granted. Moreover, it claims that 4625.0900 is clearly written to assure adequate space for each resident. The limitation on rooms below ground level in that rule must be read in that context, to assure habitable space, and not to assure safe egress.

Neither party was able to state with certainty why the rule governing space requirements precludes sleeping rooms that are largely below grade. However, taken in context, since the rule largely governs square footage rather than safety, one must reasonably conclude that the purpose was to assure that there was adequate light and



ventilation. No other safety provisions are included in that rule. If more than half of the room were above grade, the issues concerning the egress window would not arise.

Nonetheless, 4625.0900 prohibits sleeping quarters that are more than half below grade. Because of the prohibition, the variance criteria must be applied. It is in this context that the Department must determine that the variance will have no potential adverse effect on public health, safety, or the environment. There is no entitlement to the variance; the Department's judgment will inevitably come into play in making the determination.

CAL argues against the Department's position because, so long as only five residents lived in the home, a downstairs bedroom was acceptable, even though residents with the same level of needs were sleeping downstairs. It was only when the capacity increased by one that the Department's rule for a lodging establishment came in to play. In CAL's view, nothing else has changed. Ms. Novak stated that some residents prefer the lower level bedroom because it gives them greater privacy and access to extra space. For persons who have been living independently, it may be an easier transition.

In light of the needs of the persons in the CAL homes, and CAL's admission that the residents typically need closer supervision than residents of a larger assisted living facility, it was reasonable for the Department to conclude that a variance will have an adverse effect on the resident's safety. The health of a resident can change quickly, and it may not be possible to immediately move the resident to an upper level room. A quick move could be confusing and disruptive for the resident.

There is a lift on the stairs of each home, but that fact has no bearing on this decision. CAL's witnesses asserted that the lift was available so that other residents or family members could access the lower level, not to aid the residents who sleep in the lower level to exit. If power is lost, the lift could not be used. Since CAL does not rely upon the lift, it is not material to this decision. The egress windows are not easy to exit. As the video shows, even a young, able-bodied person must take a large step up, crank open the window, crouch to get through the window, and navigate up narrow steps. In daylight and warm weather, this would be a challenge for an older person, but the difficulty would be much greater in the dark, in poor weather, or in an emergency. With six residents in the home and one staff person on duty, it is unlikely that a staff person would be available to assist. Also, CAL stated that it conducts fire drills once a month until the resident demonstrates that he or she can safely exit through the egress windows, and quarterly thereafter. This is evidence that using the egress windows is not simple or automatic. Should an emergency occur while resident is still mastering the egress, it could lead to a tragic result or, at best, be a frightening event for the resident while he or she struggled to exit.

CAL is correct that Minn. R. 4625.2000, which addresses fire protection, does not prohibit egress windows from a basement. However, Minn. R. 4625.0900 prohibits such bedrooms that are more than half below grade. Thus, one cannot assume that no additional fire protections would have been required if such below-grade bedrooms

were permitted. For this reason, the *Accardi Doctrine*, upon which CAL relies, is inapposite. Here, the rule specifically prohibits below-grade bedrooms. It is only in the context of the variance that CAL raises the fire protection rule. The Department is not attempting to ignore the fire marshal's standards for bedrooms that meet its rule requirements.

CAL claims that denial of the variance would impose a financial hardship because reducing the number of residents from six to five will decrease CAL's revenue. It claims that the moratorium may not allow relicensing for Adult Foster Care. There was no direct evidence that Dakota and Scott Counties would not license these homes for Adult Foster Care. If the counties believe that there is a need for the services that CAL provides, it may approve the homes for Adult Foster Care and each CAL home could serve five residents. This would lead to some lost revenue, but one cannot conclude that the loss imposes an undue burden when the homes were previously providing care to five residents. What CAL will lose is its ability to recover its costs to build out the additional bedroom.

The one unsatisfactory aspect of denying the variance is that the very same individuals will be able to sleep in the lower level bedrooms if the total number of residents in the home does not exceed five and the home operates under the Adult Foster Care license. There is little difference between the services provided to the residents under either license. The variance, with the conditions that CAL agreed to meet, would better protect the residents than reducing the number of residents to five with no additional protections. This inconsistency between the lodging establishment rule and the Adult Foster Care rule is difficult to reconcile. Yet, that the rules may be imperfect in their application does not make them invalid.

The Department could have chosen to grant the variance because the fire protection requirements were met, in essence applying those standards as the measure of whether there was adequate protection of health and safety. However, the fire protection rules do not take into account the physical and mental condition of the residents, and because of the exclusion in the rule for below-grade bedrooms, were not written to address that possibility. It is not an abuse of its discretion to consider the difficulty of egress for the vulnerable adults receiving care in the CAL homes. Although able-bodied people might be able to exit through the egress windows, it would be very difficult to rely on this means of escape for those who face physical or mental challenges, as the residents of the CAL homes do. The Department does not have the means to carefully monitor the homes to assure that only able adults are living in the lower level rooms.

Overall, CAL has failed to demonstrate that the variance was improperly denied. It is unfortunate that CAL may have undertaken remodeling in good faith and without fully understanding the rules that would prohibit adding lower level bedrooms. However, the denial of the variance does not necessarily prohibit CAL from continuing to serve elderly residents.

**B.J.H.**